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In The

Supreme Court of the United States

October Term, 1984

CAROL DUNCAN, d/b/a TV NEWS CLIPS,

Petitioner,

vs.

PACIFIC AND SOUTHERN COMPANY, INC., d/b/a WXIA-TV,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF AMICUS CURIAE INTERNATIONAL ASSOCIATION OF BROADCAST MONITORS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a television station's copyright protection relating to its television newscasts is sufficiently broad to prohibit the service provided to the public by broadcast monitors.

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STATUTE

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BRIEF OF AMICUS CURIAE INTERNATIONAL ASSOCIATION OF BROADCAST MONITORS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STATEMENT OF INTEREST

This amicus brief is filed with the consent of both parties, as set forth in separate letters from respective counsel separately filed with the Clerk's office.

The International Association of Broadcast Monitors ("IABM") is an association composed of over thirty-five broadcast monitors located throughout the United States, Canada, and Europe. The purpose of IABM is to consider and deal with "common problems involved in the monitoring of radio and television transmissions for interested persons in furtherance of their rights of access to materials pertaining to their activities or affairs . . . and to secure cooperative action in advancing common purposes" of its members.

IABM is engaged in a number of activities to promote the mutual interest of its members. For example, IABM regularly publishes a newsletter to its members discussing monitoring practices that have proven effective or opportunities that may exist for its members. IABM also sponsors an annual convention to discuss the many evolving issues relating to the new industry. In addition, IABM has promulgated a Code of Ethics setting forth, among other regulations, strict record-keeping and labelling requirements for all videoclips prepared by a broadcast monitor.

The decision of the Eleventh Circuit will have a profound effect upon the broadcast monitoring industry. The industry, which is still very much in its infancy, performs

a variety of useful services for its clients. Amicus believes that this case raises significant public issues warranting the Court's plenary review. Given IABM's familiarity with the industry, this amicus brief is intended to provide relevant information that will be useful to the Court in its consideration of the petition for certiorari.

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SUMMARY OF ARGUMENT

The decision of the Eleventh Circuit involves a timely issue of public significance impacting many interests in addition to the private interests of the parties to the litigation. The conceptual difficulties involved in applying copyright law, and more specifically the fair use doctrine, in the context of the evolving electronic media and other technologically advanced communication enterprises is well-focused in this case.

The fair use doctrine is structurally the most significant principle regulating the complex interaction between copyright and First Amendment values. The Eleventh Circuit decision improperly ascribed controlling weight to the commercial nature of the petitioner's use. This emphasis is inconsistent with other Courts of Appeals, most notably the Second Circuit, that have focused on other factors.

To analyze the fair use issue involved in this case, the courts must assess the ultimate use by the clients and consumers who utilize the services of the broadcast monitors. If this proper orientation is recognized, the strong public interests in access and fairness overwhelmingly

support the application of the fair use doctrine in this case.

The recent advent of the commercial free speech doctrine provides additional authority for the proposition that the commercial nature of the use *per se* should not be of controlling significance in a fair use analysis. To resolve the fair use question properly, courts must focus on the totality of the use including benefits received by members of the public who purchase the services of the broadcast monitor.

Not only will the specific issue concerning broadcast monitoring result in additional litigation,[1] but the development of high technology communication devices and the incredible growth in and need for information retrieval systems assure similar conflicts of equally serious dimension. A proper exposition of the purpose and application of the fair use doctrine, specifically the relative significance of the commercial nature of the use vis-a-vis other interests, will serve an important function in providing guidance to the courts and the many entities involved with similar issues.

Given the significance of the issues raised, and the public importance of the debate, amicus respectfully request that the Court grant the petition for certiorari.

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[1]Another action raising similar issues is now pending in the United States District Court for the Southern District of Texas. *See Community Television Foundation of South Florida, Inc., d/b/a WPBT-TV, Channel 2 v. Jack Cato and Shirley Cato, d/b/a Broadcast News Report,* Civil Action No. H-83-5742. Additional litigation is likely. The Eleventh Circuit's decision has already received substantial publicity in the trade press for the broadcast industry, including suggestions as to how to draft cease and desist letters to broadcast monitors.

ARGUMENT

While petitioner has provided a complete description of the relevant facts relating to the suit, as well as a useful overview of the broadcast monitoring industry, additional detail relating to that industry will benefit the Court in its analysis of the petition.

The services provided by petitioner are typical of the services provided by broadcast monitors elsewhere.[2] Thus, as a regular part of their business, most broadcast monitors record television newscasts or news-related documentaries, and then to sell relevant portions of these programs, known as videoclips, to interested members of the public.

As one advertising brochure for an IABM member succinctly states, "a broadcast monitor provides an electronic clipping service of the broadcast media for those public relations professionals, corporations and individuals needing a record of what's being said about them and when, where, and how it's being said." The broadcast monitor is the only effective means of providing access

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[2]An excellent example of the industries' present capabilities is provided by the business activities of Video Monitoring Services, a company affiliated with Burrelle's Information Services, a member of IABM. Burrelle's is the world's largest clipping service, and is also involved in computerized advertising analysis, electronic data base searching, and publishing a variety of informational directories. It provides monitoring services from facilities located in New York, Los Angeles, Chicago, and San Francisco, from which Video Monitoring Services monitors local news programming in over 40 major American cities, and also covers national newscasts. Burrelle's and its affiliated companies including V.M.S. employ over 900 individuals.

to the media, and thereafter preserving information for analysis, research, or personal use.

The sale of single videoclips to individuals was the focus of the Eleventh Circuit decision; it is, however, hardly the only function performed by broadcast monitors. All broadcast monitors have a large number of ongoing clients who employ them to monitor local news reports for stories involving that client or events of importance to that client.

The monitors can also independently provide an overview of media coverage including analysis of the overall effect of news reports. For example, one IABM member, Caisse, Chartier et Associates, Inc., a Canadian broadcast monitor, regularly analyzes print and broadcast media coverage and objectively provides an impact analysis of the coverage concerning an upcoming election or of a corporation's public image. This information can then be used by the client to direct or re-direct public opinion. These services, like the basic monitoring function itself, are of substantial benefit to the general public.

By providing access to small portions of news broadcasts placed on the public airways, a monitoring service provides the capacity to gather and assemble such information into a usable form for the person interested in the newscast, as well as an ability to analyze the reports for marketing or related purposes.

These services are important since no other entity is in a position to perform that function. Television stations themselves do not regularly maintain complete copies of news broadcasts; most do not archive a permanent record of news reports for public scrutiny or access. Rather, like

the respondent in this case, the usual practice is to erase the videotapes of the news broadcasts within approximately one week. Of course, one television station could not perform the monitoring function in any event since it could not tape the news reports of its many competitors.

Also, most stations, like WXIA in the present case, do not have the capability or interest to prepare and sell videoclips. Indeed, as recognized by the District Court, there is an inherent conflict of interest in providing such a service. If the station were more interested in selling videoclips than reporting the news objectively, the entire editorial approach to newscasting would be warped. Moreover, stations have a clear interest in erasing news reports in order to limit access to the reports by potential plaintiffs in defamation actions.

While the clients themselves theoretically could monitor all the news broadcasts, only the largest corporations could afford the considerable investment in monitoring equipment and personnel to do so. Moreover, clients seldom have advanced knowledge of news coverage, and given small publicity staffs and inadequate technical capabilities to monitor all relevant news sources simultaneously, it is impossible for the clients to provide comprehensive coverage. Accordingly, the broadcast monitor is the only entity with the capability or interest in providing the valuable services it renders.

The broadcast monitoring industry is a new one. Broadcast monitors are increasingly performing a number of important services for the public, and this evolution will surely continue unless restrictive judicial deci-

sions undercut the progress. Monitoring can be used for a variety of public relations purposes including archiving, researching trends, or collecting educational resource material. The range of services matches the range of public interests that are threatened by the possible curtail of services that may result if the Eleventh Circuit decision is not reviewed by this Court.

The following services are presently being offered by members of IABM:

Review Of Media Coverage For Political Candidates

Broadcast monitors can review and analyze comments relating to political candidates to permit the candidate to assess media coverage or conduct voter awareness surveys. Monitoring services can also assist candidates in identifying important issues, preparing their political platforms, or responding to any perceived "image" problems revealed by the monitoring.

Assembling Material For Use By Attorneys In Civil And Criminal Proceedings

Attorneys regularly have the need for access to information conveyed over television newscasts to assist in effective representation of their clients. An attorney attempting to show bias can use videoclips of relevant portions of newscasts or summaries of news reports provided by broadcast monitors evidencing community sentiment or prejudice. Attorneys have regularly used broadcast monitors in connection with the preparation of motions for change of venue in criminal cases. In another

example, Mrs. Duncan herself provided monitoring services to the attorneys for Wayne Williams, the defendant in the famous Atlanta child murder cases, before formal charges were filed against Mr. Williams in an effort to limit harassment by news reporters. Broadcast monitors have also been used to insure that television stations actually issue retractions when factual errors have been made.

Attorneys also seek access to local news broadcasts for material providing direct evidence relating to issues raised in litigation, such as interviews with significant witnesses, or clips showing significant factual events such as fires at establishments that are then submitted to insurance companies in connection with claims procedures.

Marketing Or Public Relations Surveys

Corporations regularly use broadcast monitors to collect news stories about them. These reports are useful to their marketing departments to ascertain public sentiment about the corporation. As noted above, IABM members use their capability to prepare marketing analyses for use by corporate clients. This capability is one that promises to become an even more significant part of the broadcast monitor's array of services in the future. The list of corporations that now use broadcast monitors would exceed several pages, and would run the gamut from industry giants such as AT&T, Texaco, and Sears to smaller concerns such as Kroger Food Stores, United Way, and an almost infinite variety of local and regional companies.

In addition to corporations, clients who regularly utilize broadcast monitors to assist in marketing or public relations include important participants in public life such

as symphonies, opera houses, hospitals, historical foundations, universities, charitable organizations, and similar organizations who are concerned with public opinion, and who are interested in assuring that the media's reports are accurate and, hopefully, favorable.[3]

Inexplicably, the Eleventh Circuit stated that the petitioner's use was *not* creative or productive. *Pacific and Southern Co. v. Duncan,* 744 F.2d 1490, 1496 (11th Cir. 1984). This observation completely ignores the broadcast monitors' function. As noted above, no one but the broadcast monitor can supply the equipment or personnel to perform the variety of comprehensive services required to monitor all news reports. Thus, the broadcast monitors' services are clearly productive, *i.e.* they perform a service that cannot be provided without their knowledge and industry. Moreover, many of the services rendered by broadcast monitors clearly are creative. Thus, to the extent that the monitor is correlating news reports from different stations or analyzing the contents of reports, as is often the case, the service being provided is creative.

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[3]Evidence presented in *Community Television Foundation of South Florida, Inc., d/b/a WPBT-TV Channel 2 v. Jack Cato and Shirley Cato, d/b/a Broadcast News Reports,* Civil Action No. H-83-5742 (U.S.D.C., S.D. Tex.), provides several examples. The Houston Grand Opera, for instance, uses the services of a broadcast monitor, having found that it was essential that it review all television reports concerning its programs and operations: (1) in order to evaluate its marketing and publicity campaigns; (2) to be informed of the identity of members of the media with whom it should deal; (3) to review clips as a reference point for future publicity efforts; and (4) for archiving purposes since it is impossible for its limited staff to do so itself.

The Eleventh Circuit's skewed orientation colors its entire opinion.

For the reasons that follow, amicus believes that this Court should grant certiorari.

1. The Eleventh Circuit's limited focus and emphasis on the commercial nature of petitioner's use is in conflict with decisions from other Courts of Appeals.

The fair use defense is intended to "balance the public interest in the free flow of ideas with the copyright holder's interest in the exclusive use of his work." *Warner Brothers, Inc. v. American Broadcasting Companies,* 720 F.2d 231, 242 (2d Cir. 1983). The fair use doctrine is an important means of resolving the conflicts that arise between First Amendment and copyright law. *See Wainwright Securities, Inc. v. Wall Street Transcript Corp.,* 558 F.2d 91, 95 (2d Cir. 1977), *cert. denied,* 434 U.S. 1014 (1978).

In this case, the Eleventh Circuit found that the commercial nature of the use prohibited the application of the fair use doctrine. While a number of separate points were raised by the Court, all of the discussion supporting the inapplicability of the doctrine related to the commercial nature of petitioner's use. This holding is significant, since many of the legal disagreements raising fair use issues involve commercial uses.

While the Court noted that all four factors set forth in 17 U.S.C. § 107, the recently-enacted statute codifying the fair use doctrine, were applicable to its analysis, the Court held that the commercial "purpose and character" of the use "heavily influence[d]" its determination. *Pacific and Southern Co. v. Duncan,* 744 F.2d 1490, 1496 (11th Cir. 1984). The Court went on to characterize petition-

er's use as "unabashedly commercial." Moreover, it expressly rejected petitioner's focus on the public purposes served by its operations by noting that the "fact that [petitioner] focuses on the giving rather than the taking cannot hide the fact that profit is its primary motive for making the exchange."

By considering only the commercial nature of petitioner's use, the Eleventh Circuit has seriously eroded the vitality of the fair use doctrine. Broadcast monitors provide a host of beneficial services to members of the public having a legitimate interest in news reports relating to them. The Eleventh Circuit's focus was unduly limited in that it totally ignored the substantial needs and interests of the clientele served by broadcast monitors. The Court incorrectly assumed that the only type of business activity conducted by monitors was the solicitation of previously unknown consumers. As set forth above, this notion is fundamentally incorrect, as all monitors have a significant number of on-going clients for which they perform monitoring services.

The Eleventh Circuit's decision should be contrasted with the Second Circuit's approach to fair use cases. In *Consumers Union of United States, Inc. v. General Signal Corp.*, 724 F.2d 1044 (2d Cir. 1983), *cert. denied*, 105 S.Ct. 100 (1984), the Second Circuit considered whether the fair use doctrine protected a company's advertisement quoting a Consumers Union report on vacuum cleaners despite the fact that Consumers Union did not permit its reports to be used in this manner in order to assure its independence and credibility among its readers. In its argument, Consumers Union stressed the commercial nature of the advertising use by the defendant. The Second

Circuit *rejected* this emphasis on the commercial function and instead noted that "[a]lthough the purpose of [the company's] use undoubtedly is commercial, *this fact alone does not defeat a fair use defense.*" *Consumers Union*, 724 F.2d at 1049 (emphasis added). Regardless of the defendant's motive, *the character* of the use was to convey useful information to consumers of the type protected by the First Amendment. *Id.* (*citing Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)). By focusing on the *ultimate* use by the consumers, the Second Circuit disregarded or overlooked the commercial nature of the use by the company. Instead, it recognized and gave substantial weight to the public's First Amendment interest. *Cf. Harper & Row Publishers, Inc. v. Nation Enterprises*, 723 F.2d 195, 208 (2d Cir. 1983) ("the fact that profit was involved is, without more, legally irrelevant where the work in which the use appears offers some benefit to the public"), *cert. granted*, 52 U.S.L.W. 3860 (1984).

The Eleventh Circuit decision in this case is in direct conflict with the Second Circuit's decision in *Consumers Union*. Rather than focusing on the *customers'* legitimate interests, the Eleventh Circuit focused solely on the commercial nature of the broadcast monitor's use. In contrast, the Second Circuit looked past the "unabashedly commercial" nature of the use to analyze the overall interests of the ultimate consumers, *i.e.* the general public.

Nor is *Consumers Union* distinguishable on other grounds. The small portions of newscasts used by a broadcast monitor do not represent a more significant use of a copyrighted work than using Consumers Union's test reports for advertising vacuum cleaners. Indeed, the pub-

lic interest of the ultimate consumers to be aware of the exact contents of news reports about them constitutes a more substantial First Amendment interest than the commercial free speech interest involved in *Consumers Union.*

It is also important to recognize the nature of the copyrighted work—a concern ignored by the Eleventh Circuit. Numerous courts have recognized that news reports or largely factual and historical material are entitled to *less* copyright protection than more creative enterprises. *See, e.g., Miller v. Universal City Studios, Inc.,* 650 F.2d 1365 (5th Cir. 1981); *Hoehling v. Universal Studios, Inc.,* 618 F.2d 972 (2d Cir. 1980), *cert. denied,* 449 U.S. 841 (1980). *See generally National Business Lists, Inc. v. Dun & Bradstreet, Inc.,* 552 F.Supp. 89, 96 (N.D. Ill. 1982) ("fair use of research is broad, the fair use of compilation information is narrower, but certainly greater than the permissible fair use of more creative products"). Thus, where the nature of the work is informational rather than creative, the scope of permissible fair use is greater. *See Rosemont Enterprises, Inc. v. Random House, Inc.,* 366 F.2d 303, 307 (2d Cir. 1966), *cert. denied,* 385 U.S. 1009 (1967). The public interest in dissemination of information is entitled to substantially greater weight than afforded to it by the Eleventh Circuit.

The advent of the commercial free speech doctrine provides additional authority for the proposition that the commercial nature of the use *per se* should not be of controlling significance in fair use analysis. For example, in *Bates v. Arizona State Bar,* 433 U.S. 350 (1977), this Court went beyond the fact that the attorney conducting the advertising had a clear, indeed even "unabashed," com-

mercial interest in placing the advertisement. Rather, the Court analyzed the interest of the ultimate consumer in receiving the material to determine the First Amendment interests at stake. The Eleventh Circuit failed to conduct the same type of analysis. The First Amendment interest in this case cannot be dependent solely upon the existence of a non-commercial motive. Rather, a proper constitutional analysis involves consideration of the overall function and character of the activity.

2. The Eleventh Circuit's reliance on an unproven and, in any event insignificant, "potential" market is in conflict with the other Courts of Appeals' emphasis on direct competition for purposes of fair use analysis.

The Courts of Appeals have recognized that the single most important factor in analyzing a fair use issue is the *actual effect on direct competition* between the copyright owner and the user. *Consumers Union,* 724 F.2d at 1050. *See Iowa State University Research Foundation, Inc. v. American Broadcasting Companies,* 621 F.2d 57 (2d Cir. 1980) (where scope of the defendant's use is the same as the copyright owner's use, fair use doctrine should be narrowly applied).

In contrast to the above approach, the Eleventh Circuit embarked on a potential market analysis without support in prior copyright case law. By focusing on a *potential* market analysis of non-existent economic reality to the respondent, the Eleventh Circuit created new, and potentially dangerous precedent that will limit creative efforts by others.

The record established that the petitioner did not compete with the respondent in the news reporting business.

Rather, petitioner served a limited secondary market essentially of her own making. Respondent did not provide monitoring services and had no plans to do so. Moreover, as previously explained, a single television station could not provide monitoring services even if it were interested in selling videoclips of its own news programs since it could not provide comprehensive monitoring of other station's broadcasts.

It is thus undisputed that petitioner does not directly compete with respondent in the news reporting business. Nonetheless, the Eleventh Circuit held that the petitioner's use adversely impacted the copyright owner's interests by focusing upon the existence of an unproven, and indeed hypothetical, *potential* market. This analysis apparently confuses a doctrine borrowed from trademark infringement cases or perhaps antitrust law, although the Court cited no authority whatsoever.

In contrast, other Courts of Appeal have focused upon the *actual* market for the copyrighted work, and have ignored insignificant or non-existent potential uses altogether. In *Consumers Union,* for example, the Second Circuit noted that some consumers might purchase back issues of the Consumer Reports magazine containing the vacuum cleaner report if the advertisement was enjoined. Nonetheless, the Court rejected this potential adverse effect on Consumers Union as being too insignificant to constitute the type of effect on direct competition that would be relevant for fair use purposes. *Consumers Union,* 724 F.2d at 1051 (fair use analysis depends on effect of the use on the "demand for the original work"). *Cf. Wain-*

wright Securities Inc. v. Wall Street Transcript Corporation, 558 F.2d 91, 96 (2d Cir. 1977) (rejecting fair use defense where "obvious intent, if not the effect," of the use was to fulfill "the demand for the original work"); *Rubin v. Boston Magazine Co.,* 645 F.2d 80, 84 (1st Cir. 1981) (noting that plaintiff was injured by defendant's use as shown by actual discussions concerning sale to other user). Other courts have similarly observed that a use by a non-competitor is more likely to qualify as a fair use since it is unlikely to cause any injury to the market for the copyrighted materials. *See The New York Times Co. v. Roxbury Data Interface, Inc.,* 434 F. Supp. 217, 223 (D.N.J. 1977).

3. The Eleventh Circuit's decision conflicts with Sony and the First Amendment in that it effectively denies the right of members of the public to obtain tapes directly relating to them.

The potential applicability of the fair use doctrine in recording news broadcasts was expressly recognized by the Supreme Court in *Sony Corporation of America, Inc. v. Universal City Studios, Inc.,* 104 S.Ct. 774, 813 n. 40 (1984). There, the Court noted that all copyrights were not fungible, but that some related to material with broad secondary markets with significant economic value. The Court noted that such material is entitled to broad protection because of the "greater potential for commercial harm. *Copying a news broadcast may have a stronger claim to fair use than copying a motion picture." Id.* (emphasis added).

The logic of the Court's observation is inescapable. There is no tremendous artistry or significant commercial potential in direct subsequent uses of single portions of news broadcasts. To be sure, broadcasters may add a

measure of originality in the editing process. The law properly permits a fair measure of copyright protection to prevent other news reporting competitors from usurping the copyright owner's product. There is no reason to provide significant additional protection vis-a-vis non-competitors.

The Eleventh Circuit's decision below is inconsistent with *Sony*. In *Sony*, this Court determined that individual citizens had the right under the fair use doctrine to tape all types of programming material for home use. Under *Sony*, there is no doubt that individuals, corporations, or other entities could themselves tape portions of newscasts about themselves for the many purposes outlined above.[4]

Without doubt, *Sony* would protect the right of individual members of the public to tape news and related television programming, and thereafter use the tapes for performing the same type of analysis and services now being conducted by broadcast monitors. This process would be nothing more than the routine librarying now authorized under *Sony*.

Given the practical impossibility of individuals or single corporations investing in monitoring equipment and

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[4]Indeed, individuals would probably have the right to tape newscasts about themselves even if the dissenting viewpoint in *Sony* had prevailed. *Sony* primarily concerned entertainment programming such as movies, etc., where the consumer had no personal interest. In the present case, the consumers have a clear interest in the news being reported about them. Indeed, their claim to the story is probably stronger than that of the news station.

personnel, these clients simply have broadcast monitors perform the taping and monitoring function on their behalf. This process should be protected under *Sony*. In practical terms, it is absurd to argue that the fair use doctrine permits individuals and corporations to do the taping, but denies that right to a broadcast monitor doing the same function on behalf of the client.

CONCLUSION

The Eleventh Circuit decision significantly bolsters the monopoly power of the copyright owner in an inappropriate context. The decision fails to articulate the significant differences between copyright protection as between users who are competitors and those who are not. Moreover, the unprecedented protection is provided in the context of news reporting that should be subject to lesser protection for the copyright owner, not more. The Eleventh Circuit's decision did not analyze the important public interest in access to television news reports. There are many members of the public, including corporations, politicians, attorneys, and individuals who are legitimately interested in what the press is reporting about them. For these individuals and entities, the services provided by broadcast monitors are the only means of obtaining meaningful access.

For the foregoing reasons, Amicus respectfully urges the Court to grant the petition for certiorari.

Respectfully submitted,

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